United States Court of Appeals
FOR THE NINTH CIRCUIT

No. 18,904

MARINE MIDLAND TRUST COMPANY, etc., *et al.*,
Appellants,
vs.
CITY OF NORTH SACRAMENTO, etc.,
Appellees.

REPLY BRIEF OF APPELLANTS MARINE MIDLAND TRUST COMPANY, *ET AL.*

FILED

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REPLY BRIEF OF APPELLANTS MARINE MIDLAND TRUST COMPANY, *ET AL.*

Preliminary Statement

Although purporting to rely upon the decision of the District Court below dismissing appellants' (herein "plaintiffs") complaint as insufficient, appellees' (herein "defendants") brief ranges far beyond the lower court's decisional grounds. Defendants now reargue questions of fact long since determined adversely to them not only by the district court's denial of their earlier motion for summary judgment, but also because their prevailing motion, having been addressed to the sufficiency of the complaint, presumes the truth of all allegations in the complaint. Defendants also belately seek to inject arguments never addressed to the district court.*

* For example, defendants' brief (hereinafter "Def. Br."), at p. 36, contends, for the first time in this litigation, that purchasers of the revenue bonds in question are necessary parties to this action.

Our reply brief will first focus upon the basic distortion or misunderstanding of the nature of plaintiffs' claim, upon which all the arguments in defendants' brief—new and old alike—are premised. We urge that it will follow that the entire framework of argument defendants erect is specious and insubstantial.

POINT I

Defendants' brief ignores the true nature and basis of plaintiffs' claim.

Defendants' earlier motion for summary judgment was properly denied by the district court because it found issues of fact present. One of these issues of fact, vigorously argued in the court below, is whether plaintiffs were united in interest and in privity with Citizens Utilities Company of California (hereinafter "Citizens of California").

Defendants subsequently prevailed before the lower court on their motion attacking the sufficiency of the complaint under the Rule 12, F.R.C.P. But their brief tries (*e.g.,* Def. Br. at pp. 2-8) once again to probe the factual questions on which the lower court had previously precluded them. We respectfully suggest this is improper and should be disregarded for the purposes of this appeal.

Therefore, taking the allegations of the complaint at their face value, it is apparent that the nature of plaintiffs' claim below is completely misconstrued in defendants' brief. The substance of defendants' argument is summarized in the following quotation from their brief (Def. Br. p. 22):

> "The wrong which plaintiffs complain of would of course be a wrong to the corporation, Citizens of

> California. The action is essentially a claim that the water system was wrongfully taken from the corporation in that no valid payment of just compensation was made. If the deposit of $2,206,000 is 'tainted' money and an ineffective payment of the condemnation award, the wrong is to Citizens of California. The corporation is the real party in interest, for if plaintiffs' action were successful in obtaining restoration, Citizens of California and not the plaintiffs would be entitled to it."

A. The true nature of plaintiffs' claim.

Defendants' interpretation of the wrong of which plaintiffs complained below, is completely incorrect. The wrong was not to Citizens of California. Rather plaintiffs emphasized that *they* would be forced, as a direct result of fraudulent acts committed by defendants, to accept a fund of tainted money and that such possession would subject *them* to claims of various kinds.

It is quite true that Citizens of California might *ultimately* be one of the conduits through which this money would pass in reaching plaintiffs, pursuant to a pledge agreement to which plaintiffs and the parent company of Citizens of California are party. However, Citizens of California has not yet taken possession of nor received any of the tainted money in question and has not exercised any dominion over it. Therefore, plaintiffs, at this time, neither require nor have they requested any relief against Citizens of California, for they are presently threatened with no injury from that company. Plaintiffs would appear able to obtain complete relief from the threatened wrong by an *in personam* order of the district court requiring that defendants pay their obligations from a new fund of untainted money.

Defendants' brief makes much of the content of the complaint's prayer for relief. It argues, in effect, that the portion thereof requesting a declaration that the taking of the property of Citizens of California be held unconstitutional, must be viewed as defining the nature of plaintiffs' claim. Similarly, one of the principal grounds relied upon by defendants in arguing that plaintiffs lack standing to bring the present action, is that the prayer for relief, in part, requests relief of such a nature as would benefit Citizens of California. In fact, defendants' argument to the court below went so far as to describe the entire prayer of the complaint as though it sought only the restoration of the expropriated water system to Citizens of California. However, it is clear that any relief to Citizens of California which may be requested in plaintiffs' prayer is subsidiary and sought only as ancillary to plaintiffs' primary prayer that the money now on deposit in the court be declared an improper substitute for plaintiffs' prior security.

Even if a portion of the prayer for relief is excessive, unwarranted or otherwise improper, this would not be a ground for depriving plaintiffs of their day in court through a dismissal of the complaint. It is well-settled that a prayer for relief does not affect the validity of a complaint. (See *e.g., Truth Seeker Co., Inc.* v. *Durning,* 147 F. 2d 54, 56 (2d Cir. 1954); *Schoonover* v. *Schoonover,* 172 F. 2d 526, 530 (10th Cir. 1954); *Johnson* v. *Granquist,* 191 F. Supp. 591, 592 (D. Ore. 1961). The district court properly recognized this rule even though it found that plaintiffs were not entitled to the relief sought on the basis of the facts pleaded.

B. The nature of plaintiffs' claim precludes any argument that Citizens of California is an indispensable party or that it should be aligned with plaintiffs to defeat the district court's diversity jurisdiction.

Plaintiffs can obtain full relief from the threatened wrong referred to in their complaint through a declaratory judgment that need have no reference to Citizens of California. Unless and until the tainted funds in question are placed in possession of Citizens of California, that company has no necessary connection with the relief sought by plaintiffs. Nor is it necessary that Citizens of California, in its role as a mere conduit of funds, be directly concerned with any liability that might attach to the ultimate recipient of such funds.

The existence of a justiciable and valid claim to relief by plaintiffs and of plaintiffs' independent standing to maintain the present action for a declaratory judgment are demonstrated in Point I of plaintiffs' principal brief (pp. 8-12). Nevertheless, defendants' brief repeatedly tries to equate factually the interests of Citizens of California with those of plaintiffs so as to support the specious arguments that there is a complete "privity" between them. (See e.g., Def. Br. p. 10.)

But when defendants' conclusory and unsubstantiated averments of privity are ignored (as they must be on a motion addressed to the sufficiency of the complaint) it is clear that nothing in this record requires that Citizens of California be joined as an indispensable party to the action.

Contrary to defendants' principal argument, it is clear that plaintiffs' standing to bring this action in no way derives from any right of action accruing to Citizens of

California. The complaint establishes that the money deposited by defendants in supposed exchange for the taking of Citizens of California's property will ultimately be transmitted to plaintiffs. Plaintiffs' right to relief arises from the fact that defendants have thereby started in motion a train of events which, without the intervention of the court, would lead to the receipt of money by plaintiffs with knowledge of the wrong perpetrated by defendants in obtaining it. This constitutes a separate wrong done plaintiffs, whether they be denominated pledgees, shareholders, mortgagors, parties to an agreement, or anything else. There is, on the face of it, a substantial difference between the interests of plaintiffs and that of Citizens of California, for the latter may have no concern at all with the question of whether the money in the state court's registry is tainted.

Many decisions make it clear that where such a separate wrong exists, even a stockholder would be entitled to sue in his own right and would not be required to sue on behalf of the corporation. For example, in *Southern Pacific Co.* v. *Bogert,* 250 U. S. 483 (1919), Mr. Justice Brandeis stated (at p. 487):

> "The minority stockholders do not complain of a wrong done the corporation or of any wrong done by it to them. They complain of the wrong done them directly by the Southern Pacific [in wrongfully acquiring the corporation's bonds] and by it alone. The wrong consists in [Southern Pacific's] failure to share with them, the minority, the proceeds of the common property of which it, through majority stockholdings, had rightfully taken control."

This independent standing of an injured stockholder to sue in his own right has been given recognition in many

subsequent decisions, including New York cases.* For example, in *Sterne* v. *Orenstein,* 42 N.Y.S. 2d 314 (not officially reported) (Sup. Ct., N.Y. Co. 1943), the court stated (at p. 315):

> "The mere fact that there is a corporation involved and that there could be stockholders' actions brought for some of the wrongs alleged here is of itself no reason why the plaintiff, who was hurt individually, cannot bring an action such as this. If he was wronged individually, he has a remedy."

Likewise, in *Bunyan* v. *Commissioners of Palisades Interstate Park,* 167 App. Div. 457 (3rd Dept. 1915), the court stated (at pp. 459-60):

> "The next ground of challenge to this application is that these bondholders cannot bring this action without first having applied either to the corporation or to the mortgage trustee, and only then upon the refusal of such trustee to act. The corporation clearly does not represent the bondholders. A judgment against the corporation would have no effect whatever as against the bondholders, unless they were made parties to the action. The mortgage trustee represents them in a limited capacity. * * * That this action may be brought by the bondholders without a request to the trustee would seem to be held in the action of Carter *v.* Fortney (170 Fed. Rep. 463), and this decision was further sustained by the United States Circuit Court of Appeals in the same action under the title of *Fortney* v. *Carter* (203 id. 454)."

Similarly, in *Selman* v. *Allen,* 121 N.Y.S. 2d 142, 145 (not officially reported) (Sup. Ct., N.Y. Co. 1953), the Court stated:

> "There, of course, are many instances of direct wrongs to individual stockholders which give rise to

* As pointed out in plaintiffs' principal brief (at p. 10), New York law is controlling on the question of plaintiffs' independent standing to sue.

> an individual cause of action in favor of individual stockholders * * * Coronado Development Corp. *v.* Millikin, 175 Misc. 1, 4, 5, 22 N.Y.S. 2d 670, 673.
>
> "It is possible, too, for the same facts to constitute a wrong to the corporation and also to the individual stockholders, so that a stockholder may *elect* whether to sue in the right of the corporation for the wrong done to it *or* in his own right for the wrong done to him [citing several New York cases] * * * The right of election exists where the facts constitute a wrong to the stockholder individually as well as a wrong to the corporation." (Emphasis added.)

See also to the same effect *Perlman* v. *Feldman,* 219 F. 2d 173, 176 (2d Cir. 1955); *Landell* v. *Northern Pacific Railway Co.,* 98 F. Supp. 479 (D.D.C. 1951).

Since, as we have shown, plaintiffs have a claim which is "personal" to them and separate and distinct from any claim which may be advanced by Citizens of California, it must follow that Citizens of California is not an indispensable party to this action.

That prosecution of this action by plaintiffs may simultaneously confer a benefit upon Citizens of California impels no contrary conclusion. See the above-quoted portion of *Selman* v. *Allen, supra,* and cases therein cited; *Sterne* v. *Orenstein, supra,* at p. 315 ("The fact that a stockholder may bring an action on behalf of the corporation does not bar this action [citing cases]".)

This conclusion is also supported by the language of Mr. Justice Brandeis in *Southern Pacific Co.* v. *Bogert, supra* at (p. 492):

> "The Southern Pacific also urges that the suit must fail because the old Houston Company is an

> indispensable party and has not been joined. The contention proceeds upon a misconception of the nature of the suit. Since its purpose is merely to hold the Southern Pacific as trustee for the plaintiffs individually of the property which it has received, the old Houston Company is in no way interested and *would not even be a proper party.*" (Emphasis added.)

See also *Perlman* v. *Feldman, supra; Landell* v. *Northern Pacific Railway Co., supra.*

Defendants argue at length (Def. Br. pp. 28-29) that permitting a pledgee of stock to bring an action without joining the pledgor corporation would create a loophole to Rule 23(b), F.R.C.P. Whatever may be the merits of this argument, it clearly has no application here where the plaintiffs' right of action is not derived from the corporation's, but exists irrespective of plaintiffs' status as stockholder, pledgee, or any other connection with the corporation in question.*

Thus, it is quite apparent that the question before this Court, no matter what the plaintiffs may be called—whether stockholders, pledgees, or anything else—is merely: does the complaint allege that plaintiffs have themselves been injured or are threatened with injury as a result of the wrong committed by defendants? The answer must clearly be in the affirmative.

The district court refused to rest its dismissal of the complaint on any finding that Citizens of California was an indispensable party to the action. This refusal was clearly correct in view of the well recognized principle

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* As defendants themselves point out in their brief, plaintiffs have no connection whatsoever with Citizens of California; their claim arises out of an agreement with the parent company of Citizens of California.

that Federal district courts will strain to avoid having their diversity jurisdiction ousted by any such finding concerning indispensable parties. Thus, where a party is merely "necessary", but not "indispensable" it is clear that Federal courts, wherever possible, will proceed without such party to avoid having its jurisdiction defeated. See *e.g., State of Washington* v. *United States,* 87 F. 2d 421 (9th Cir. 1936); *Dunham* v. *Robertson,* 198 F. 2d 316, 319 (10th Cir. 1952).

One of the primary elements to which courts will look in determining whether a party is merely a necessary one or is indispensable to an action, is the factual question of whether a decree made in the absence of such party would necessarily injure it. *State of Washington* v. *United States, supra,* pp. 427-428.

Defendants argue at length that the interests of plaintiffs and of Citizens of California are indentical. They further urge that such identity of interest must be taken into account in aligning the parties, and that this community or identity of interest must defeat diversity upon a ruling that Citizens of California is an indispensable party.

However, to the extent that the interests of plaintiffs and of Citizens of California are, in fact, parallel, as alleged by defendants, no prejudice can result to Citizens of California by its being omitted from this action. To this extent, Citizens of California should not be deemed an indispensable party in this action.* If, on the other hand, defendants still insist that prejudice will result to Citizens of California by virtue of its being omitted from the

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* Plaintiffs, in reliance on Mr. Justice Brandeis' statement in *Southern Pacific* v. *Bogert,* quoted, *supra,* would take the further position that Citizens of California is not even a *necessary* party to this action, to say nothing of being an *indispensable* party.

present action, this can only be by virtue of the fact that Citizens of California has interests adverse to those of plaintiffs. If this be the case, it would then obviously be improper to align Citizens of California on the side of plaintiffs in determining the question of diversity. See e.g., *Smith* v. *Sperling,* 354 U. S. 91, 97, 98 (1957); *Doctor* v. *Harrington,* 196 U. S. 579, 587-88 (1905).

Citizens of California, although not actually in voluntary conflict with plaintiffs, could eventually be forced by the requirements of the trust indenture to participate in the delivery of the tainted money, which it may hereafter receive, to plaintiffs. This also would constitute an act sufficiently adverse to plaintiffs' interests to require aligning Citizens of California as an opposing party for the purposes of determining diversity. Cf. *Foster* v. *Carlin,* 200 F. 2d 943, 951-52 (4th Cir. 1952).

POINT II

There is no merit to defendants' argument that this action is barred by the state court's condemnation judgment.

The discussion under Point I hereinabove clearly demonstrates the independent nature of plaintiffs' claim and plaintiffs' standing to sue in their own right, independent of any relation with or rights derivative from Citizens of California. Plaintiffs' principal brief (Point II, at pp. 12-33) has also conclusively shown that no issues of fact relevant to plaintiffs' claims herein were or could have been raised before or passed upon by the state court in connection with that court's interlocutory judgment of condemnation—the judgment allegedly collaterally attacked by this action.

The foregoing constitutes a full and complete answer to defendants' specious arguments set forth as the foundation-stone of their brief (see Def. Br. pp. 8 *et seq.*) that the present action represents a collateral attack on the state court judgment.

Defendants' aforesaid arguments (e.g. Def. Br. pp. 11-12), moreover, are erected on an artificial edifice of language, pulled out of context, relating to the *res judicata* effect of decrees on parties to the action in which such decrees were entered, which is, of course, completely irrelevant to this case. No citation of authority is needed to support the proposition that the principle of *res judicata* thus relied upon by defendants has no application whatsoever to persons, such as plaintiffs, who were not parties to the previous action or to a claim completely distinct from anything litigated in the previous action.

Moreover, applicable authorities make it clear that even if the privity between the plaintiffs and Citizens of California, which defendants' brief so groundlessly persists in urging, did actually exist, plaintiffs would nevertheless not be barred from maintaining the present action.

Defendants' principal contention underlying their estoppel argument is that plaintiffs are seeking, by means of the instant action, to relitigate a defense which Citizens of California could have interposed in the state court condemnation action. They go on to urge that the state court judgment is, accordingly, effectively *res judicata* in respect of all the issues in this action (Def. Br. p. 12).

This argument, however, ignores or pretends to ignore, the highly significant fact that a state court condemnation action is an *in rem* proceeding which thereby makes ordinary rules of *res judicata* inapplicable. It follows from the *in rem* nature of the state court judgment that plain-

tiffs, as strangers to the state court decree, would normally be bound only by the ultimate facts established thereby and not by subordinate questions of fact or law. Even were plaintiffs determined to be in privity with Citizens of California in the state action, applicable authorities indicate that as a result of the *in rem* nature of that proceeding, plaintiffs would not be barred from asserting their present claim, since it was neither litigated nor determined in the state action.

A. Plaintiffs are strangers to the state court's *in rem* decree and are thus not bound by any subsidiary issues which the decree may have determined.

There can be no dispute that the state condemnation action was an *in rem* proceeding. *Boyle-LaCoste* v. *Superior Court,* 46 Cal. App. 2d 636, 642 (1st Div. 1941). Accord: *Harrington* v. *Superior Court,* 194 Cal. 185, 189 (1924).

It follows that plaintiffs are not bound by any "implied" findings that might be read into such a decree, for it is also clear that strangers to an *in rem* decree are bound only by the ultimate fact established by such decree and not by subordinate determinations of questions of law or fact. See, e.g., *Gratiot State Bank* v. *Johnson,* 249 U. S. 246, 248, 249 (1919); *Estate of Bloom,* 213 Cal. 575, 578 (1931); California Code of Civil Procedure, § 1908.

Thus, in *Estate of Bloom, supra,* the California Supreme Court stated (at p. 578):

> "* * * strangers though bound to admit the title or status which the [*in rem*] judgment establishes are not bound by the findings of fact."

Similarly, Mr. Justice Brandeis, in *Gratiot State Bank* v. *Johnson, supra,* while stating with reference to an *in rem*

decree that (p. 248) "even strangers to the decree may not attack it collaterally" also held (at p. 249) that a stranger "is unaffected by the decision of even essential subsidiary issues."

This distinction between *in rem* and *in personam* actions is given explicit recognition by the Calfornia Code of Civil Procedure which provides (§ 1908):

> "The effect of a judgment or final order in an action or special proceeding before a Court or Judge of this state, or of the United States, having jurisdiction to pronounce the judgment or order, is as follows:
>
> "One—*In case of a judgment or order against a specific thing,* or in respect to the probate of a will, or the administration of the estate of a decedent, or in respect to the personal, political or legal condition or relation of a particular person, *the judgment or order is conclusive upon the title to the thing,* the will or administration, or the condition or rela tion of the person.
>
> "Two—In other cases, the judgment or order is, in respect to the matter directly adjudged conclusive between the parties and their successors in interest by title subsequent to the commencement of the action or special proceeding, litigating for the same thing under the same title and in the same capacity, provided they have notice, actual or constructive, of the pendency of the action or proceeding." (Emphasis added.)

Granting defendants the benefit of every doubt, it is clear that the ultimate fact or title determined by the state court decree allegedly collaterally attacked by this proceeding was that the City of North Sacramento had the right and power to condemn the waterworks

previously owned by Citizens of California. Any finding concerning the existence or nonexistence of improprieties in obtaining the money which was deposited in the registry of the state court was necessarily subsidiary to the Condemnation Court's ultimate finding of title in City of North Sacramento.

The cases above cited also defeat any argument that defendants are bound by a finding of validity of payment even if such finding were an essential underpinning to the *in rem* decree. See also, *Becher* v. *Contoure Laboratories,* 279 U. S. 388 (1929), in which Mr. Justice Holmes stated (at p. 391):

> "* * * [a] judgment *in rem* binds all the world but the facts on which it necessarily proceeds are not established against all the world."

Defendants have attempted to avoid the force of this rule by contending that plaintiffs herein were in privity with Citizens of California in the state condemnation action. The language of the district court's decision negates this argument, inasmuch as it explicitly states (Tr. 49):

> "Plaintiffs herein were not a party to the condemnation action in the Superior Court."

So also does that court's earlier denial of defendants' motion for summary judgment. Nevertheless defendants attempt to find support for their argument in *Gagnon Inc.* v. *Nevada Desert Inn, Inc.,* 45 C. 2d 448, 453 (1955), a shareholder's derivative suit in which the Court held that shareholders suing on behalf of a corporation were precluded from their suit by a previous judgment against the corporation on the same cause of action. This case supports plaintiffs' position, rather than that of defend-

ants. For, the rule of privity applies only when the "same legal rights" have been represented at a previous trial. *Dillard* v. *McKnight,* 34 C. 2d 209, 215 (1958). In the instant case, there is no basis for any assertion that plaintiffs' interests were represented in the *in rem* proceeding. As heretofore discussed, plaintiffs, as pledgees, have an individual right of action completely unrelated to any right of action of the corporation based both on the impairment of their security interest and on the threatened receipt of a fund of tainted money, unlike shareholders whose standing in a derivative suit "derives" from an injury to the corporation.

Defendants also contend that the state *in rem* decree bars all matters which *might* have been raised by plaintiffs herein (Def. Br. p. 11). Such a rule would require strangers to an *in rem* proceeding to intervene in that proceeding in order to protect themselves from preclusion of a later action based on associated *in personam* claims. The Supreme Court, by Mr. Justice Brandeis, squarely rejected such a contention in *Gratiot State Bank* v. *Johnson,* 249 U. S. 246 (1919), stating (at pp. 249-50):

> "The trustee contends, however, that since by §§18b and 59f of the Bankruptcy Act, any creditor is entitled to intervene in the bankruptcy proceedings, the Bank should be considered a party thereto. These sections are permissive, not mandatory. They give to a creditor, who fears that he will be prejudiced by an adjudication of bankruptcy, the right to contest the petition. Whether he does so or not, he will be bound, like the rest of the world, by the judgment, so far as it is strictly an adjudication of bankruptcy. But he is under no obligation to intervene, and the existence of the right is not equivalent to actual intervention. Unless he exercises the right to become a party, he remains a stranger to the

> litigation and, as such, unaffected by the decision of even essential subsidiary issues. *In re McCrum,* 214 Fed. Rep. 207, 213; *Culinane* v. *Bank,* 123 Iowa, 340, 342. The rule is general that persons who might have made themselves parties to a litigation between strangers, but did not, are not bound by the judgment."

By the same token, plaintiffs herein should not be bound by subsidiary determinations of issues which they arguably could have raised, but did not.

B. Even if plaintiffs were in privity with Citizens of California, they would not be bound by any implicit determination as to the validity of the payment into the registry of the state court since that issue was neither litigated before, nor determined in, the state court *in rem* condemnation proceeding.

Even if it be assumed *arguendo* that plaintiffs were in privity with Citizens of California in the state *in rem* proceeding, they would still not be debarred from this action for, as heretofore discussed, it is clear that the issues raised by the instant suit were neither litigated nor decided in the state action.

It is true that an *in rem* action bars parties, privies and even strangers as to the ultimate fact determined therein. It also bars parties and privies as to facts actually litigated and decided therein. However, even parties and privies are not bound by subordinate findings in the *in rem* action which were never litigated and decided. See, *e.g., Friend* v. *Talcott,* 228 U. S. 27 (1913); *Myers* v. *International Co.,* 263 U. S. 64 (1923); *Headen* v. *Pope & Talbott, Inc.,* 252 F. 2d 739, 744-45 (5th Cir. 1958); *United States* v. *Verrier,* 179 F. Supp. 336 (D. Me. 1959); Restatement, Judgments §73 (1942 ed.).

The rule is succinctly stated in the Restatement of Judgments, *supra,* as follows:

> "§73. PROCEEDINGS WITH RESPECT TO PROPERTY.
>
> "(1) In a proceeding in rem with respect to a thing the judgment is conclusive upon all persons as to interests in the thing.
>
> "(2) *A judgment in such a proceeding* will not bind any one personally unless the court has jurisdiction over him, and it *is not conclusive as to a fact upon which the judgment is based* except between persons who have actually litigated the question of the existence of the fact." (Emphasis supplied.)

In this connection compare *Friend* v. *Talcott, supra* (where an *in personam* action based on claims associated with a prior *in rem* action was held not barred because the issues raised in the *in personam* action had not been litigated and decided in the *in rem* action) with *Myers* v. *International Co., supra* (where an *in personam* action following an *in rem* action was held barred because the issues raised in the later *in personam* action had been litigated and decided in the *in rem* action.)

Our case is clearly governed by *Friend* v. *Talcott* because as defendants concede (Def. Br. p. 12):

> "Citizens of California did not raise the contentions respecting the validity of payment [in the state action] that plaintiffs have raised in the federal action."

It is also abundantly clear that no such determination would ordinarily be made in a state condemnation action and that none was in fact, made in this action. Therefore, under the rule of both *Friend* v. *Talcott* and *Myers* v. *International Co.,* plaintiffs herein are not precluded from

maintaining the present *in personam* action because, even if they were in privity with Citizens of California, that company never litigated the issue raised by the instant action and such issue was never decided by the state court.

It should be noted also that all of the cases cited by defendants in support of their argument (Def. Br. p. 11) that the judgment in the *in rem* condemnation action is "final not only as to all questions which were actually raised but as to all questions and contentions which could have been raised," involved *in personam* determinations. As hereinabove noted, the ordinary rules of *res judicata* in *in personam* actions do not apply to *in rem* actions.

Myers v. *International Co.,* 263 U. S. 64 (1923) supplies an additional refutation of defendants' argument. There it was determined in an *in rem* bankruptcy proceeding that certain statements of the bankrupt to one creditor had not been fraudulent. Subsequently that creditor commenced a separate action in deceit. The Court in *Meyers* held that plaintiff was barred because (unlike our own case) the issue sought to be raised in the subsequent *in personam* action had been litigated by plaintiff and decided adversely to plaintiff in the previous *in rem* proceeding. The court noted, however, that plaintiff was not barred by *res judicata* because his *in personam* action was not on the same cause of action as the previous *in rem* suit. The court quoted the relevant principles and applied them as follows (pp. 70-71):

> "The general principles which must govern here are laid down in an oftquoted opinion of Mr. Justice Field in Cromwell *v.* Sac County, 94 U. S. 351. In that case suit had been brought upon coupons attached to bonds issued by the county for the

erection of a school house, and it was adjudged that the bonds and coupons were invalid in the hands of one not a *bona fide* holder for value before maturity, and as the plaintiff had not shown himself to be such a holder, he could not recover. In a second suit on other coupons from the same bond, he proved that he was a holder for value before maturity and the county sought to defeat the second suit by pleading the judgment in the first as *res judicata*. It was held that the cause was different and that the first judgment was not a bar. Mr. Justice Field said (pp. 352, 353):

'In considering the operation of this judgment, it should be borne in mind, as stated by counsel, that there is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. In the former case, the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose * * *

'But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action, the inquiry must always be as to the point or question actually

litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action.' See also Southern Pacific R. R. Co. *v.* United States, 168 U. S. 1, 50; Troxell *v.* Delaware, Lackawanna & Western R. R. Co., 227 U. S. 434, 440.

"*Coming now to apply these principles to the case before us, it is very clear that the opposition to the composition in the bankruptcy court was not the same cause of action as the suit for deceit here.* That is settled by the decision of this Court in *Friend* v. *Talcott,* 228 U. S. 27, in a case involving similar facts, to be more fully stated. The defense of res judicata as to the cause was therefore, not established by the judgment confirming the composition." (Emphasis supplied.)

The crucial point to be noted is that the Court, even though later in its opinion, holding that plaintiff's claim in its subsequent *in personam* action was barred by collateral estoppel, found it "very clear" that plaintiffs' appearance and opposition to the order in the *in rem* bankruptcy action "was not the same cause of action as the [*in personam*] suit for deceit here." Consequently the bar was not that of *res judicata* which concludes "parties and those in privity with them not only as to every matter which was offered and received to sustain or defeat the claim or demand, but also as to any other admissible matter which might have been offered for that purpose." The court only found in *Meyers,* that plaintiff was barred by *collateral estoppel,* which bars relitigation only "of the point or question actually litigated and determined in the original [*in rem*] action, not what might have been thus litigated and determined."

The *Myers* case, *supra*, clearly demonstrates the inapplicability to our case of the principle of *res judicata*, upon which defendants' argument primarily rests. The inapplicability of the even narrower principle of collateral estoppel is shown both by *Gratiot State Bank* v. *Johnson*, 249 U. S. 246 (Point II-A, *supra*) and by *Friend* v. *Talcott*, 228 U. S. 27.

CONCLUSION

The judgment below dismissing the complaint for failure to state a claim upon which relief can be granted should be reversed.

Dated: Sacramento, California,
February 19, 1964.

Respectfully submitted,

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Certificate

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those Rules.

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